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No. 01-808

Supreme Court, U.S.
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In The

Supreme Court of the United States

W. TAYLOE MURPHY, JR.,
Secretary of Natural Resources, Commonwealth of Virginia, and ROBERT G. BURNLEY, Director, Department of Environmental Quality, Commonwealth of Virginia,

Petitioners,

v.

WASTE MANAGEMENT HOLDINGS, INCORPORATED, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the dormant Commerce Clause, what is the appropriate level of scrutiny for a statute arising from mixed motives, partly legitimate and partly discriminatory?

2. When a State enacts laws to protect itself from the health and safety hazards posed by municipal solid waste, may the State impose identical restrictions on *all* such waste – regardless of its source – or is the State obligated to give preferential treatment to waste from States whose laws are facially similar to the laws of the regulating State?

3. (a) Under the dormant Commerce Clause, may a State interfere with the national common market by forcing – or "dumping" – undesirable goods into interstate commerce so as to protect the originating State from their undesirable effects?

   (b) If not, to what extent are the goods thus "dumped" nevertheless protected by the dormant Commerce Clause?

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This reply brief is filed by Virginia Attorney General Jerry W. Kilgore on behalf of W. Tayloe Murphy, Jr., Secretary of Natural Resources of Virginia, and Robert G. Burnley, Director of the Virginia Department of Environmental Quality (collectively, "the Commonwealth").[1]

I. THE COURT SHOULD CLARIFY WHICH LEVEL OF SCRUTINY APPLIES WHEN A STATUTE HAS MIXED PURPOSES.

This case presents an important issue of constitutional law: What level of scrutiny applies when a statute arises from mixed motives, partly legitimate and partly discriminatory? Respondents do not deny the importance of this issue, nor do they contend that the Court has previously decided it. Instead, they attempt to dissuade the Court from granting *certiorari* by claiming this case is not a good vehicle for addressing the question. They are mistaken.

A. Respondents suggest, in effect, that the Commonwealth should have struck a different balance in its arguments below, focusing less on facts and more on the legal standard to be applied to the facts. Br. in Opp. at 17-18. Yet, the Commonwealth made plain its view that strict scrutiny is triggered under the "purpose" prong only when legislation is enacted for "the *sole* purpose of burdening out-of-state consumers." Opening Brief of Defendants-Appellants at 44 (emphasis added). Thus, the Commonwealth argued, the fact that discriminatory purposes motivated "a *few* of Virginia office-holders . . . unquestionably fails to establish discriminatory motivations of *the 138 members* of the General Assembly who

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[1] The original petitioners, Ronald P. Hamm and Dennis H. Treacy, have been succeeded in office by Mr. Murphy and Mr. Burnley. *See* Sup. Ct. R. 35.3.

voted on this legislation." *Id.* at 45 (emphasis added). Thus, the Commonwealth argued that the "sole purpose" standard was not met. This approach was rejected by the Fourth Circuit, but, the issue was preserved.

B. Respondents say rejection of the "sole purpose" standard does not represent a conflict in Commerce Clause cases. Br. in Opp. at 18-19. Yet, the case they cite, *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995), does not support the standard used below. While *Harvey* says the discriminatory purpose need not be "primary" in order to invoke strict scrutiny, it does *not* say that "any" discriminatory purpose will suffice.

More importantly, when one steps back from Commerce Clause cases and looks more broadly at the jurisprudence of legislative purpose, there is definitely a conflict. The petition showed a conflict between the approach followed below and the way legislative purpose is approached in Establishment Clause cases, a point respondents do not dispute. Instead, respondents suggest that a more pertinent standard would be the one followed in equal protection cases. Br. in Opp. at 19. It is a suggestion the Court may wish to consider if *certiorari* is granted. At this stage, however, what is important about the equal protection cases is that they *also* approach legislative purpose in a way that conflicts with the approach below. This is shown by *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), cited by respondents. There the Court said that if racial discrimination is shown to be a purpose, then the defendants are entitled to show that that they would have reached the same decision even if the illegitimate motive had not been at play. *Id.* at 270, n. 21. *See also Batson v. Kentucky*, 476 U.S. 79, 96-97 (1985) (once the accused has shown the prosecutor is excluding jurors of a particular race, the prosecutor is allowed to present non-racial reasons for the exclusion). This contrasts sharply with the approach followed below, where the inquiry into legislative purpose ends once *any* illegitimate purpose is found.

C. Respondents claim the Fourth Circuit decision does not permit a conclusion that mixed motives were at work here. Br. in Opp. at 19. The court said the evidence is sufficient to show that the statutes are "justified by a reason other than economic protectionism." App. at 44. Respondents ignore this finding. Instead, they quote this passage: "No reasonable juror could find the statutory provisions at issue had a purpose other than to *reduce the flow* of MSW generated outside Virginia into Virginia for disposal." Br. in Opp. at 19, quoting App. 39-40 (emphasis added). There is no conflict between the two passages.[2] Reduction of out-of-state products has a "discriminatory purpose" in the sense at issue here only to the extent the *underlying* purpose is economic protectionism.[3] To say that the purpose of these statutes is to reduce the flow of out-of-state waste does not say whether the underlying purposes of that reduction are economic protectionism (*i.e.*, discrimination) and/or some benign and, hence, non-discriminatory purpose. While the Fourth Circuit found economic protectionism to be afoot, it also found evidence to support a finding of other, benign motives, *i.e.*, protection of the public health. In short, the Fourth Circuit correctly recognized that *mixed* motives may be at work.

D. Respondents claim the evidence of discriminatory *effect* is so strong they are entitled to summary judgment on the point. They say this is an alternative basis for invoking strict scrutiny here, and they spend several paragraphs reciting evidence they think shows

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[2] Moreover, to the extent this Court believes that there is a conflict between these two passages, the narrower passage, which is the Commonwealth's interpretation, must control. *See generally Marks v. United States*, 450 U.S. 188, 193 (1977).

[3] Were it otherwise, then a facially neutral statute enacted solely for the benign motive of protecting the public health would be subject to strict scrutiny simply because the health threat was one emanating chiefly from outside the state. Such a result goes too far.

discriminatory effect. The Commonwealth need not respond in kind. First, the issue does not appear in either of the competing "Questions Presented." *Compare* Pet. at i with Br. in Opp. at (I). Second, the Fourth Circuit carefully reviewed the evidence in order to determine whether there was discriminatory effect as a matter of law. On the three statutes at issue here – the Daily Cap, the Trucking Certification, and Four Axle – the court rejected summary judgment on discriminatory effect, finding instead a genuine dispute of material facts. It is unlikely that respondents could persuade this Court to reach a different conclusion. Third, if the Court agrees with the Commonwealth that mixed motives do not trigger strict scrutiny, the case will need to be remanded for further proceedings. Respondents will have a chance on remand to persuade a finder of fact that there is a discriminatory effect. Respondents' attempt to litigate discriminatory effect now is misplaced, and should not deter the Court from clarifying the legal standard for assessing discriminatory purpose.

II. THE COURT SHOULD DECIDE WHETHER A STATE, IN THE EXERCISE OF ITS SOVEREIGN POWERS OVER HEALTH AND SAFETY, IS REQUIRED TO GIVE PREFERENTIAL TREATMENT TO GOODS FROM PARTICULAR STATES.

Even if the court of appeals were somehow correct in applying strict scrutiny, Virginia has a legitimate public health concern that could justify a restriction on interstate commerce. The Fourth Circuit acknowledged this point.[4] Given *Maine v. Taylor*, 477 U.S. 131 (1986), the court of appeals should have allowed Virginia to place limits on all municipal solid waste ("MSW"), regardless of source, as a means of protecting the public health. Yet, the court of appeals said Virginia must treat MSW differently,

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[4] Contrary to respondents' brief, the Fourth Circuit did not simply assume "arguendo" that this was so. Br. in Opp. at 23.

depending upon the State of origin. App. 47-48. This decision is not only contrary to *Taylor*, but is unreasonable and unworkable. *See* Pet. at 20-23. *Certiorari* should be granted in order to address the discretion available to a State when it restricts interstate commerce for health and safety reasons.

A. Respondents first argue that the issue is too narrow and case-specific to merit this Court's attention. Br. in Opp. at 23. They are mistaken. Virginia is not the only State that has a problem wrestling with the health hazards of out-of-state waste. This is shown, for example, by the number of cases dealing with out-of-state wastes heard by this Court in recent years. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992); *Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992). Moreover, the need to regulate interstate commerce for health and safety reasons arises in contexts other than waste disposal. Analogous concerns arises in the context of agricultural commodities. *See, e.g., Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

B. Respondents next contend that there is no conflict between the decision below and *Taylor*. They say that *all* out-of-state baitfish posed health hazards for Maine, while only *some* out-of-state waste poses health hazards for Virginia. Br. in Opp. at 24. Again, they are mistaken. In *Taylor*, it was far from certain that *any* baitfish posed a health risk. *See Taylor*, 477 U.S. at 142. Yet, this Court found that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." *Id.* at 148. Conversely, in this case, it is undisputed that *some* out-of-state MSW poses health hazards. If Maine has a legitimate interest in protecting against "imperfectly understood environmental risks" then Virginia certainly has at least as much legitimate

interest in protecting against a health risk that all parties acknowledge.

Moreover, in determining whether an outright ban was the least discriminatory means of achieving the objective, *Taylor* did not require the State to take the extraordinary measures required by the Fourth Circuit. It is likely that baitfish from some States were more dangerous than baitfish from other States. Yet, this Court did not require a state-by-state analysis of whether baitfish contained the problematic parasite. Instead, this Court said that a "State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost." *Taylor*, 477 U.S. at 147. Thus, the Court allowed Maine to treat all out-of-state baitfish as a single category and, based on the *potential* of significant health risks within that category, allowed the entire category to be banned. If the court of appeals had followed *Taylor*, it would have treated out-of-state MSW coming into Virginia as a single category and allowed Virginia to place limits on the entire category.

C. Respondents seek to dissuade the Court from granting *certiorari* by attacking the legitimacy of Virginia's health and safety interests, calling those interests a "sham" and "post-hoc rationalization." Pet. at 24-25. This strident accusation runs contrary to the Fourth Circuit's finding that the evidence supports the Commonwealth's claim of legitimate purpose. "Legitimate purpose" and "least discriminatory means" are two separate parts of the Commerce Clause strict scrutiny test. There is no need for the Court to revisit facts pertaining to the former in order to decide what legal standard applies to the latter.

D. Respondents say the Fourth Circuit decision is "clearly right." Br. in Opp. at 26. They ask this Court to accept that assertion without addressing – much less refuting – the Commonwealth's explanation of why a state-by-state approach is unreasonable and unworkable.

Pet. at 22-23. Respondents' inability to defend the practical consequences of the decision below underscores the worth of this case as a candidate for *certiorari*.

E. Finally, respondents claim that Virginia has feasible alternatives *other than* the state-by-state approach required by the court of appeals. Br. in Opp. at 26-27. The Commonwealth disagrees. The alternatives proposed by respondents carry their own set of problems in terms of costs, inefficiency and ineffectiveness. The court of appeals has not addressed any of them. This Court need not do so either, and certainly need not be concerned about them in deciding whether to grant *certiorari*. Later, if the Court agrees with the Commonwealth that a state-by-state approach cannot be required, then the Court may remand the case for further proceedings on the factual minutiae of respondents' alternative theories.

III. THE COURT SHOULD CLARIFY WHETHER A STATE MAY INTERFERE WITH THE NATIONAL COMMON MARKET BY REQUIRING THE EXPORT OF UNDESIRABLE PRODUCTS.

The Constitution creates a national common market where interstate commerce must flow freely. Absent special circumstances, individual States may not restrict interstate trade. By the same logic, individual States should not be able to *require* interstate trade by artificially diverting – *i.e.*, dumping – undesirable goods into other States. Yet, the issue of interstate dumping has never been addressed by this Court. It is a "missing corner" of Commerce Clause jurisprudence.

A. Respondents ask the Court to deny *certiorari* because there is no conflict among the lower courts. But they failed to address the analogous issues discussed in the petition. Several courts have held that a State cannot "banish" or "export" its undesirable citizens (*i.e.*, convicts) to other States. *See Pet.* at 28-29. Yet, even without such cases, interstate dumping still presents an important

question of constitutional law that has not been, but should be, settled by this Court. S. Ct. R. 10(c). While respondents demean the question as "frivolous," Br. in Opp. at 17, they never explain why they think it is unimportant. Nor do they deny that interstate dumping violates principles of free trade among the States. The issue is clearly one worthy of this Court's attention.

B. Respondents also claim that, in acting to divert its wastes across state lines, New York City was acting as "a market participant, rather than a market regulator," and was thus immune from restrictions of the Commerce Clause. Br. in Opp. at 28. In other words, respondents challenge the legal adequacy of the Commonwealth's affirmative defenses by claiming that, even if allowed to assert those defenses, Virginia would not prevail on the facts. This is inappropriate. Having persuaded the courts below not to hear any evidence about Virginia's affirmative defenses, respondents cannot now go outside the record with self-serving, untested claims about what such evidence would show.

Moreover, respondents offer little support for their market participant theory. They say that New York did not *statutorily* require wastes from the City to be exported to other States. They also claim that New York's requests for proposal "merely indicated a preference" for the use of barges. The Commerce Clause forbids a State from attempting to isolate itself from a common economic problem. *See Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). It is no defense to say that New York achieved that isolation without passing a statute. There was still government action aimed at achieving isolation. Respondents do not deny that the barge "preference" has the purpose and effect of precluding disposal in upstate New York sites reachable only by truck; nor do they deny that New York discriminates against Virginia and other States by giving communities in New York a veto over whether garbage from the City would be taken there. *See* Pet. at 9-10.

Whether New York was acting as a market participant – or as market regulator – is an issue that respondents may be entitled to raise – on remand – once it is established that the Commonwealth is entitled to assert its affirmative defenses. This Court should grant *certiorari*, establish Virginia's right to assert those defenses, and remand the case for a consideration of the relevant evidence.

C. The respondents mischaracterize Virginia's position when they suggest the Commonwealth is seeking a right of retaliation. Virginia does not seek to divert its garbage into New York, nor does it seek retaliation in any other way. Instead, Virginia seeks to show: (i) that the Commerce Clause precludes New York from requiring the exportation of undesirable goods, and (ii) that a violation of that constitutional provision affects this case in three ways that are independent grounds for denying respondents declaratory or injunctive relief. First, contracts that result from unconstitutional conduct – including respondents' waste disposal contracts – are against public policy and therefore null and void. The inability to perform such a contract is not a cognizable injury. As parties to such contracts, respondents lack standing to challenge the validity of the Virginia statutes that allegedly prevent such performance. Second, as the Commonwealth alleged, but was never allowed to prove, the respondents have "unclean hands." Thus, on familiar equitable principles, they are not entitled to injunctive relief. Third, goods placed in interstate commerce in violation of the Commerce Clause should not be allowed to claim the protection of the Commerce Clause, at least when subjected to facially neutral measures of the type at issue here. Those contentions are far different from contending that one State may retaliate against another.

D. Finally, respondents are mistaken when they suggest that the connection between respondents and the unconstitutional conduct of New York is not an issue. As discussed above in paragraph (c) and in the petition, Pet. at 29-30, that connection is very much an issue, and it

directly implicates the extent to which wastes unconstitutionally dumped into interstate commerce by New York may nevertheless be protected by the dormant Commerce Clause. *See* Question Presented No. 3 (b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 12th day of February 2002.

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